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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

CC Docket No. 94-129

In the Matter of )  
)  
Implementation of the Subscriber Carrier )  
Selection Changes Provisions of the )  
Telecommunications Act of 1996 )  
)  
Policies and Rules Concerning )  
Unauthorized Changes of Consumers' )  
Long Distance Carriers )  
)

COMMENTS OF CABLE AND WIRELESS, INC.

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September 15, 1997

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## **SUMMARY**

Cable and Wireless, Inc. ("CWI") hereby submits comments to the Commission's Implementation of the Subscriber Selection Changes Provisions of the Telecommunications Act of 1996. CWI's comments generally support the Commission's efforts to prevent slamming and to broaden the scope of its rules to regulate the local market. Competition will be hampered in the local exchange market as the incumbent local exchange carriers attempt to maintain their dominant position in this market while the executing and submitting PC changes. CWI's comments request the Commission vigorously enforce these rules in the local market and to consider preempting state laws and regulations which address illegal PC changes in the interstate market. This preemption will enable the state commissions to focus exclusively on the local market which is much more susceptible to anti-competitive behavior.

CWI, however, strongly disagrees with several of the Commission's proposed remedies. The premium reimbursement proposal, the collection cost liability of the unauthorized carrier, and the proposal to provide consumers with the options to delay or refuse payment for services received could adversely affect the Commission's anti-slaming efforts. These proposals will provide unintended incentives to engage in or be a victim of slamming. CWI requests the Commission consider its comments when finalizing a rule which prevents slamming yet does not unjustly punish the unauthorized carrier or provide incentives to be slammed.

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**COMMENTS OF CABLE AND WIRELESS, INC.**

**I. INTRODUCTION**

Cable and Wireless Inc. ("CWI") hereby files comments pursuant to §§1.415 and 1.419 of the Commission's Rules, 47 CFR §§1.415, 1.419, in response to the Notice of Proposed Rule-making, CC 94-129, ("NPRM") released by the Commission on July 15, 1997 in the above-captioned proceeding. CWI is one of the nation's largest interexchange service providers and is now licensed to provide local telecommunications service in more than ten states.

CWI strongly supports the Commission's efforts to reduce and eventually eliminate illegal Preferred Carrier changes ("illegal PC change"), commonly referred to as "slamming." In order for the telecommunications market to operate properly and competitively, carriers cannot be rewarded for engaging in illegal PC changes and consumers should not suffer any economic harm due to such behavior.

While CWI supports the Commission's application of these rules to the local exchange market, it disagrees with several proposals in the NPRM which are designed to "make the consumer whole." The Commission should review these comments and finalize a rule which does not provide any carrier or consumer with an incentive to engage in slamming. These rules should reflect Congressional intent by ensuring the consumer receives no harm or benefit due to the illegal PC switch, the carrier which illegally effects this switch ("unauthorized carrier") retains no benefit, and the previously authorized carrier is placed in situation as if the illegal PC switch had not occurred.

**II. THE COMMISSION MUST VIGOROUSLY REGULATE SUBSCRIBER SELECTION CHANGES IN THE LOCAL MARKET.**

In order to prevent actual and potential anticompetitive behavior in the local exchange market, the Commission should apply the rules adopted in this proceeding to incumbent and competitive local exchange carriers in this market. In order to foster competition in a market currently controlled by dominant carriers, the Commission should apply its PC change verification rules and prohibit ILECs from including promotional materials in the letters of agency sent to a subscriber's residence. Further, the Commission should preempt all state laws and regulations which address subscriber selections for interstate services in order to conserve the limited resources of the state commissions needed exclusively to prevent anticompetitive behavior in the intrastate market.

**A. THE COMMISSION'S PC CHANGE VERIFICATION RULES SHOULD BE APPLIED TO THE LOCAL MARKET.**

In ¶11 of the NPRM, the Commission discusses the Presubscribed Interexchange Carrier ("PIC") change verification procedures in its current rules. These procedures were implemented in order to deter deceptive and misleading practices by interexchange carriers which engage in the unauthorized slamming of customers. These rules have benefited both consumers and the interexchange market place by creating a regulatory atmosphere where carriers which engage in slamming are not rewarded for their acts.

These rules will have consumer protection and pro-competition effects in the local market and should be applied to the local market in whole. CWI agrees with the Commission that Section 258 of the Act authorizes the Commission to apply its verification procedures to "all" telecommunications carriers. Unlike the interexchange market, incumbent local exchange carriers ("ILECs") in a competitive market will act as both an essential market element, the ILECs must execute any carrier changes, as well as a market participant, the ILECs will be competing for the same customers as the competitive local exchange carriers ("CLECs"). These dual roles are not mutually exclusive, and the ILECs will have a disincentive to act in a fair and objective manner when executing or submitting Preferred Carrier ("PC") changes.

CWI believes the Commission should increase its regulatory oversight of the ILECs in the local market and should disenfranchise the ILECs of their ability to freeze PC choices. As argued in its Statement in Support of Petition for Rulemaking to regulate the solicitation of PIC freezes or other carrier restrictions, CWI believes the ILECs have and will use their dominant position in the local exchange market to maintain their monopoly status and deter effective competition while

at the same time seeking entrance to the interexchange market pursuant to Section 271 of the Act. See CWI Statement in Support of Petition for Rulemaking, CCB/CPD 97-19. The Commission should consider implementing rules where a neutral third party would be responsible for executing PC changes and any PC freezes requested by the subscriber. This neutral third party, whether a government agency or other carrier, will not possess the bias evident in the ILECs when executing PC changes, and it will not have the incentive to implement unauthorized PC freezes on its own local exchange and interexchange subscribers. Clearly, the local exchange market, more so than the interexchange market, provides a substantially greater opportunity for anticompetitive behavior due to the dual roles of the ILECs, and the Commission should apply its PC change rules and implement increased oversight in this market in order to deter such behavior.

**B. THE ILECs SHOULD BE PROHIBITED FROM INCLUDING PROMOTIONAL MATERIALS IN LOAs.**

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In ¶15, the Commission discussed the ability of the ILECs to engage in marketing practices which would blur the distinction between market participant and executing carrier. The Commission specifically mentions the ILECs' ability and incentive to delay PC changes and the ILECs' opportunity to combine letters of agency ("LOAs") with inducements for the subscriber to switch to the ILEC.

CWI agrees with the Commission that a combination of a commercial inducement with an LOA is a violation of the Commission's existing rules. Section 64.1150(c) of the Commission's rules expressly states the letter of agency shall not be combined with inducements of any kind in the same document. This prohibition refers to all inducements and is not qualified in a manner

which would limit its scope to interexchange carriers exclusively. Further, the Commission is correct in holding the practice of including commercial inducements with an LOA would be inconsistent with the Act's consumer protection and pro-competition goals. In order for the local markets to become competitive, the Commission must issue and strongly enforce rules which will prevent the ILECs from blurring the distinction between their roles as the executing carrier, an essential market element, and as a market participant.

**C. THE COMMISSION SHOULD PREEMPT ALL STATE LAWS WHICH ADDRESS  
SUBSCRIBER CARRIER SELECTIONS FOR INTERSTATE SERVICE.**

Section 258(a) of the Communications Act and §64.1160 of the Commission's proposed rules include a negative preemption which states nothing in this section shall be interpreted as preempting state commission actions addressing subscriber carrier selections for intrastate services. However, Section 258(a) is silent as to its effect on state laws and state commission actions addressing subscriber carrier selections for interstate services. CWI argues the Commission should interpret the specificity of this negative preemption as providing the Commission with the discretion to preempt all state laws and state commission actions which address subscriber carrier selections for interstate services. Preemption of this area will provide consumers and carriers with clear, uniform rules for the regulation of illegal changes in subscriber carrier selections for interstate services. With the advent of effective local competition, the resources of the state commissions will be strained as they regulate and prevent illegal changes in subscriber carrier selections for intrastate services. It is only the Federal Communications Commission which will have the



resources and expertise to adequately enforce rules to prevent slamming which affects both intrastate and interstate services.

**III. THE COMMISSION'S RULES MUST FURTHER CONGRESSIONAL INTENT TO MAKE THE CONSUMER WHOLE.**

CWI urges the Commission to follow Congressional intent and finalize a rule which provides remedies to make the consumer whole but does not provide any incentives to engage in slamming or disincentives to report an illegal PC Change. In an effort to further protect the consumer, several of the Commission's proposals go beyond the letter of the statute and provide the consumer or the previously authorized carrier with additional remedies. The Commission should abandon these proposals since they would provide incentives and disincentives not envisioned by Congress and could actually impede the Commission's efforts to prevent illegal PC changes. First, the Commission should abandon its premium reimbursement proposal which actually provides a windfall to the previously authorized carrier and could result in an increased dedication of Commission resources to mediate disputes between carriers. Second, the Commission should recognize the proposal which allows consumers to refuse or delay payment for services received could result in a delayed report of the illegal PC switch or an increase in call volume prior to the report. Third, the Commission's rule requiring reimbursement to the slammed consumer by the properly authorized carrier would provide a windfall to the consumer and could result in potential abuse of the system. Fourth, by requiring the unauthorized carrier to reimburse the properly authorized carrier for its collection costs, this proposed rule could result in the properly author-

ized carrier having no incentive to mitigate these costs and an increased dedication of Commission resources to resolve disputes concerning these costs.

**A. THE COMMISSION SHOULD ABANDON THE PREMIUM REIMBURSEMENT PROPOSAL.**

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In ¶30, the Commission discusses a proposal, incorporated in proposed Section 64.1170(a)(2) of the Commission's rules, in which unauthorized carriers must not only reimburse the properly authorized carrier for any charges collected due to the unauthorized PC change but an amount equal to any premiums or bonuses earned by the consumer during this period. The Commission bases this proposal on the legislative history of §258 in which Congress expressed a desire that the consumer be made whole and the unauthorized carrier be liable to the authorized carrier for an amount equal to premiums earned. See Joint Explanatory Statement at 116.

CWI strongly disagrees with the Commission's premium reimbursement proposal. First, this proposal does nothing to further Section 258's overall goal of making the consumer whole. The Commission's rules should demand the properly authorized carrier reinstate any and all premiums earned by the consumer during the unauthorized PC change in a manner as if the consumer had never been slammed. The properly authorized carrier, having either been reimbursed by the unauthorized carrier or paid by the consumer in a manner which places it in a position as if the unauthorized PC change had never occurred, should reinstate all premiums with the funds collected. Since a carrier pays for consumer premiums out of revenues collected from consumers, the Commission's premium reimbursement proposal would create a situation in which the properly authorized carrier would not only receive reimbursement in an amount equal to that

which it would have collected, but it would receive a bonus since no money collected would have to be dedicated to the premiums promised to the consumer.

Second, this proposal will result in increased conflict between carriers and Commission expenditures in resolving such disputes. In ¶31, the Commission explains the dispute resolution process to be used in the event of disputes between carriers. The premium reimbursement proposal will inevitably create disputes between carriers over the actual value of the premiums and the amount which the properly authorized carrier must be reimbursed by the unauthorized carrier. These conflicts, as with other conflicts between carriers, will result in increased Commission time and manpower expenditures to resolve such disputes.

While CWI understands the Commission is providing deference to the legislative history of Section 258, the premium reimbursement proposal would have serious unintended consequences which Congress did not foresee and urges the Commission to use its interpretive powers under the Communications Act and the Administrative Procedures Act to finalize a rule which does not include this proposal. A premium reimbursement rule will have no effect on the consumer's welfare, will effectively reward the properly authorized carrier for the unauthorized PC switch, and will force the Commission to dedicate substantial resources in resolving foreseeable disputes between carriers which could otherwise be used in preventing other anti-competitive behavior.

**B. THE SLAMMED CONSUMER SHOULD NOT HAVE THE OPTIONS TO REFUSE OR DELAY PAYMENT TO THE UNAUTHORIZED CARRIER.**

In ¶27, the Commission requests comment on whether its rules should go beyond the letter of Section 258 of the Act and provide consumers with the option of refusing or delaying

payment assessed by the unauthorized carrier. The NPRM states these additional measures would appropriately further the consumer protection goals and policies of the Act and provide an increased disincentive for unauthorized carriers to engage in slamming.

CWI strongly disagrees with the Commission's proposal which provides consumers with the options to refuse or delay payment of charges assessed by the unauthorized carrier. CWI believes Section 258 of the Act was enacted in order to protect consumers, provide a substantial disincentive to engage in slamming, and to ensure authorized carriers suffer no harm due to the unauthorized PC switch. Providing consumers with the option of refusing to pay for services received, albeit unauthorized services, would provide an incentive to some consumers to abuse the system by delaying the report of the slam. Further, some consumers could abuse the system by increasing call volume and expenses during this time period, knowing they will not be responsible for the services provided. This payment refusal option suggested by the Commission could result in unauthorized carriers suffering substantially greater harm than envisioned by Congress and would result in properly authorized carriers suffering economic harm due to the slam.

Instead, CWI argues the Commission should institute a rule where the consumer would be responsible for charges incurred from the unauthorized carrier. If the consumer refuses to pay the charges, then the unauthorized carrier should have the obligation to transfer this debt to the authorized carrier. This debt should be legally recognized as any other consumer debt. This debt transfer would create a situation where a consumer could not abuse the system, the unauthorized carrier would not be rewarded in any manner for services provided due to the unauthorized PC switch, and the authorized carrier would be entitled to all funds owed since the unauthorized PC switch. In a situation where the consumer refuses payment for services received, it is only the

previously authorized carrier who has the leverage to collect this debt since only it can terminate service due to nonpayment whereas the unauthorized carrier would have no readily available remedy.

CWI, therefore, argues the Commission should not institute a rule which provides slammed consumers with the options to delay or refuse payment for services provided by the unauthorized carrier. CWI suggests the Commission strongly consider CWI's debt transfer scenario which would not provide incentives to abuse the system and would not result in the properly authorized carrier suffering undue harm.

**C. THE COMMISSION SHOULD NOT ADOPT A RULE WHERE CONSUMERS RECEIVE SERVICE WITHOUT COST.**

In ¶29, the Commission seeks comment on how its rules should be applied to make the consumer whole. Specifically, whether any charges collected by the unauthorized carrier which are remitted to the properly authorized carrier must then be reimbursed to the slammed subscriber.

CWI argues a rule requiring reimbursement to the slammed consumer by the properly authorized carrier would provide a windfall to the slammed consumer, harm the properly authorized carrier, and would not reflect Congressional intent that "consumers are made whole." Reimbursement to the slammed consumer of all charges incurred during the slamming period would create a situation where the consumer would have a disincentive to report the unauthorized PC change and would result in the consumer receiving telephone service without cost. This reim-

bursement could result in some consumers abusing the system by creating an incentive to delay the report of the slam and/or increasing call volume prior to the report.

Also, the Commission should address the issue in which the charges collected by the unauthorized carrier exceed that which the properly authorized carrier would have collected but for the unauthorized PC change. In this situation, the properly authorized carrier should retain an amount equal to that which the consumer would have paid for the identical services if the consumer had not been slammed. The properly authorized carrier should be required to reimburse the consumer for all charges collected which exceed the amount the consumer would have paid for service had the consumer not been slammed. The properly authorized carrier should have the option to reimburse the consumer by direct payment or credit towards future service.

**D. THE UNAUTHORIZED CARRIER SHOULD NOT BE RESPONSIBLE FOR THE AUTHORIZED CARRIER'S COLLECTION COSTS.**

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In ¶28, the Commission discusses Section 64.1160(b) of its rules as amended by this proceeding. CWI agrees with the Commission that new Section 64.1160(b) should require unauthorized carriers to remit an amount equal to all charges paid by the subscriber to the unauthorized carrier due to an unauthorized PC switch. However, CWI strongly disagrees with the Commission's proposal at the end of this paragraph in which this rule would be further amended to demand the unauthorized carrier also be liable to the properly authorized carrier for expenses incurred to collect such charges.

The Commission's collection charge liability proposal provides a further disincentive to engage in slamming, but it could result increased collection costs and increased Commission

oversight. First, if the unauthorized carrier were responsible for all the authorized carrier's collection costs, the authorized carrier would have no incentive to minimize these costs. Second, disputes will inevitably arise as to the purpose and amount of these costs. A rule requiring collection cost payments could potentially result in the Commission becoming substantially involved in these disputes, resulting in a significant dedication of resources which otherwise could be used in slamming prevention.

**IV. THE COMMISSION SHOULD ADOPT THE BRIGHT LINE TEST FOR UNDERLYING NETWORK CHANGE AND SHOULD FURTHER DEFINE SUBMITTING AND EXECUTING CARRIERS.**

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CWI strongly supports the Commission's use of a bright line test to determine when a reseller would be responsible for notifying the subscriber of an underlying network change. The rule determining this reliance should be based on common law agency principles of disclosure and reliance. Further, while CWI supports the Commission's definition of submitting and executing carriers, these definitions should be enhanced to include all actual and foreseeable scenarios.

**A. CWI SUPPORTS THE COMMISSION'S BRIGHT LINE TEST FOR DETERMINING THE LAWFULNESS OF A RESALE CARRIER'S CHANGE IN UNDERLYING NETWORK PROVIDER.**

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In ¶39, the Commission tentatively concludes it will establish a "bright line" test, as proposed in a petition filed by the Telecommunications Resellers Association ("TRA"), in order to provide resale carriers with more certainty "before-the-fact" when changing underlying carriers than is possible under the present case-by-case approach. The proposed test would demand dis-

closure be based on the subscriber's reliance on statements by the resale carrier that it either (1) would provide service to its subscribers using a particular underlying carrier, or (2) would not change its underlying carrier (with or without notifying its subscribers).

CWI strongly supports the Commission replacing the current case-by-case approach with a rule establishing a bright line test. The Commission's rule should employ common law agency to determine subscriber reliance. When the underlying carrier is fully disclosed, that is disclosure of both the fact that an underlying carrier is being used and the identity of the carrier, then the subscriber must be notified of any change. However, when the underlying carrier is partially disclosed, that is disclosure of the use of an underlying carrier but not its identity, or undisclosed, that is nondisclosure of both the fact that an underlying carrier is being used and its identity, then the resale carrier should have no obligation to notify the subscriber of any change in underlying carrier.

In those cases where the resale carrier has stated it would not change its underlying carrier, then subscriber reliance should be presumed regardless of the degree in which the underlying carrier has been disclosed to the subscriber. This presumption should not be eliminated by the fact that the resale carrier has not recently disclosed the underlying carrier in correspondence to the consumer, but the presumption should be rebuttable providing the resale carrier an opportunity to explain why the underlying carrier was changed without providing prior notification to the subscriber.



**B. THE COMMISSION SHOULD FURTHER DEFINE SUBMITTING AND EXECUTING CARRIERS.**

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In ¶13 of the NPRM, the Commission defines a submitting carrier as any carrier that requests a consumer's telecommunications carrier be changed and an executing carrier as any carrier that effects such a request. While CWI does not disagree with the Commission's definitions, it believes they should be enhanced to encompass all foreseeable scenarios and current market conditions.

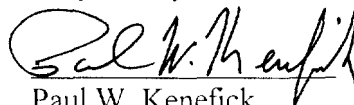
When providing service to a customer, CWI either holds itself out to the customer, provides service through an agent, or sells capacity to a reseller. Currently, when a reseller submits a PIC change it uses CWI's carrier identification code ("CIC") for identification purposes. CWI submits the PIC change to the LEC under its CIC and subsequently receives any complaint which is filed with the Commission concerning this change. CWI argues the Commission should further enhance the definitions of a submitting or executing carrier in order to determine whether a carrier such as CWI would be responsible for the PC change requested by its resellers under its CIC or would simply be acting as an agent of the reseller when submitting the PC change. Further, CWI suggests the Commission consider instituting rules where resellers of underlying carriers would be assigned their own CIC in order for a complainant and the Commission to accurately determine the carrier responsible for any unauthorized PC change. These new CICs will provide much needed administrative relief for the Commission and those carriers held responsible for PC changes due to the use of their CICs.

## V. CONCLUSION

CWI supports the Commission's efforts to eliminate slamming and provide appropriate remedies for those parties harmed due to an illegal PC change. The Commission's application of its rules to the local market is needed as the ILECs prepare to defend their dominant status in this soon to be competitive market. CWI also supports the Commission's bright line test to determine subscriber reliance for underlying carriers as well as the Commission's definitions of submitting and executing carriers, with some modifications. Additionally, CWI strongly suggests the Commission consider CWI's preemption proposal which would not only create uniform rules for interstate services but would conserve the resources of the state commissions for actual and probable anti-competitive behavior the intrastate market.

While CWI supports the scope of the Commission's PC change rules, it strongly disagrees with certain elements of this rule. Specifically, the Commission's proposals for premium reimbursement, requiring the unauthorized carrier be made responsible for the previously authorized carrier's collection costs, and providing the consumer with the options to refuse or delay payment for services received would all create disincentives and incentives not envisioned by Congress. Adoption of these proposals could potentially have an adverse effect on the Commission's efforts to prevent illegal PC changes.

Respectfully Submitted,



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